

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

<b>NELSON TREE SERVICE, INC.</b>	:	
<b>Employer</b>	:	
<b>and</b>	:	
<b>INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 369, AFL-CIO-CLC</b>	:	<b>CASE NO. 09-RC-118324</b>
<b>Petitioner</b>	:	

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**BRIEF IN OPPOSITION TO PETITIONER'S  
EXCEPTIONS TO REPORT ON OBJECTIONS AND  
RECOMMENDATIONS TO THE BOARD**

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Pursuant to Section 102.69 of the Board's Rules and Regulations, Nelson Tree Service, Inc. ("Nelson Tree") submits the following Brief in support of the Regional Director's Report on Objections and Recommendations to the Board ("Report"). For the reasons stated below, the Report of the Regional Director should be adopted and affirmed, and the results of the January 13, 2014 election declared final.

On January 17, 2014, the International Brotherhood of Electrical Workers, Local Union 369 ("Union") filed with the Region Objections to the Election in which it advanced seven numbered bases upon which it argued that the election results should be set aside. On April 15, 2014, the Union submitted to the Region an additional objection,

which the Region characterized as an “unpled objection,” in the form of a Memorandum.<sup>1</sup>

The Regional Director properly rejected each of the Union’s contentions in the Report.

In its Exceptions to the Report, the Union has now abandoned all but three of its numbered objections. Thus, the exceptions currently before the Board concern only Objection Nos. 3, 4, and 7, which all involve the purported conduct of an employee who would have been a member of the bargaining unit had the Union won the election (although the Union does not actually discuss No. 7 in its Brief), and the “unpled objection.” As was the case with the four abandoned objections, the exceptions are without merit and must be rejected.

I. The Actions of Sandy Garvin are not a Basis to Overturn the Election.

As the Regional Director noted, “these objections [Nos. 3, 4, and 7] allege in substance that the Employer’s supervisor/agent, Sandy Garvin, threatened employees with job loss if the Petitioner was voted in.” The Regional Director correctly rejected these contentions because “the Petitioner did not present any evidence that the Employer directed or authorized Garvin to speak on its behalf regarding the organizing activity or that the Employer in any way condoned Garvin’s alleged conduct.” (underline added) This total absence of evidence is fatal to the Union’s exceptions.

Reduced to its basics, the Union appears to concede that Garvin is not a supervisor as defined by the Act. The heading of Section A of the Facts suggests only that “Garvin is an Agent of the Employer” and the heading for Section B of the Argument reflects the same. This concession is understandable given that there is no evidence

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<sup>1</sup> Contrary to the requirement for objections in Section 102.69, Nelson Tree was not provided with a copy of the “unpled objection.” (See email from Field Investigator dated and attached as Exhibit A)

whatsoever that Garvin meets a single factor required to be classified as a supervisor under the Act. Thus, the Union's objections involving Sandy Garvin are only maintainable if, as a preliminary matter, the Union can establish that she was acting as the Company's agent at the time of the allegedly inappropriate conduct. Contrary to the contention of the Union, it is equally clear that Garvin was not the agent of the Company for the purposes of the acts about which the Union complains.

A. Garvin was not an Agent of the Company.

A reading of the Union's brief could lead to the mistaken conclusion that the analysis about whether an employee is the employer's agent is a general one, where actions in one area of the employee's duties establish the presence of an agency relationship for all purposes. It is necessary to reinforce, at the outset, that this is not the rule of law to be followed by the Board. Rather, even though the employee may be an agent for one purpose, like serving as an observer, it does not follow that the same employee is an agent for all purposes and at all times prior and after. *See, e.g., NLRB v. Downtown Bid Services Corp.*, 682 F.3d 109, 115 (D.C. Cir. 2012). (“[t]he job-loss threats and general aggression and harassment at the center of this case are both distinct from [the employee's] conduct as an election monitor; they are therefore outside the scope of the agency relationship.”) Instead, the employee must be found to be the agent of the employer for the specific impermissible conduct that is at issue. *See, e.g., Cornell Forge Co.*, 339 NLRB 733 (2003). This is the proper analysis that must be applied to this case.

The Board applies common law agency principles in determining whether an employee is an agent for the employer. *See, e.g., Mar-Jam Supply Co.*, 337 NLRB 337

(2001). Thus, the employee must be found to either be an express agent authorized by the Company to engage in the complained of behavior or she must have the apparent agency to act in that specific instance on the employer's behalf. Neither showing exists here.

In the present case, there is no evidence that the Company directed or even authorized Garvin to speak on its behalf with regard to whether a vote for the Union was advisable or preferred. In fact, the Company and Garvin expressly denied that anyone for the Company did so and the Union has offered no evidence to the contrary. Thus, there is no actual authority for the purportedly improper statements. *See, e.g., Cornell Forge Co.*, 339 NLRB 733 (2003).

Further, Garvin was not the Company's apparent agent with regard to the protested comments because the Company took no actions with regard to the discussions to cloak Garvin in that agency. Merely being a vocal advocate on one side of the organizing drive or the other is not enough to create apparent agency. *See, e.g., United Builders Supply Co.*, 287 NLRB 1364 (1988). Rather, the circumstances surrounding the comments must establish that the employees hearing the comments knew that the employee was authorized to speak on the party's behalf.

Here, there is no evidence that the employees believed Garvin spoke for Nelson Tree. Rather, the employees knew that she was not speaking for the Company but was expressing her own opinions. Further, the employees knew who was authorized to speak for the Company. The employees who were eligible to vote in the election had daily contact with General Foremen who they recognized as their supervisors and who spoke with them daily and responded to any questions about the issues in the campaign. In

addition, the employees had access to, and spoke with, the Regional Supervisor, Troy Mason, about the Union's interest in representing them. In short, the voting employees knew who the supervisors and agents of the Company were and they knew that Garvin was not one of them when she shared her views.

To avoid this conclusion, the Union seeks to miscast the issue into a general review of Garvin's duties. This discussion misses the point. The issue in the agency analysis is only what is occurring in the setting in which the comments were made. When the appropriate scope of review is employed – looking at the context in which Garvin allegedly made her comments – the Union has offered no evidence that the employees to whom she spoke viewed her as the Company's agent. As the Report reflects, the Region interviewed a number of Garvin's coworkers and, apparently, none who heard her comments viewed them as being the opinions of the Company.

If the issue was merely whether Garvin's duties were identical to those of other Crew Leaders, perhaps the Union would have a point. However, that is not the test. The Union must establish that, in the context of the specific comments purportedly made about the desirability of the Union as a representative, Garvin was held out by the Company and perceived by her coworkers as "speaking and acting for management." *Mid-South Drywall Co.*, 339 NLRB 480 (2003). There is no evidence whatsoever to establish this point.

B. The Union has Overstated the Actions of Garvin to Support its Theory.

The cornerstone of the Union's arguments about the content of Garvin's comments is that Garvin drove "to each job site to post election notices – and to campaign against the Union." Thus, the Union ascribes great impact to her conduct.

However, a review of the Report underlies this contention and the exaggerations vividly demonstrate how unsupported the Union's position truly is.

As the Regional Director noted, Garvin did not drive to "each job site" to post notices. Rather, "Garvin was chosen by the Employer to post the notices at one location because she drives a company truck and she was sent to the smallest of the locations." Similarly, the evidence does not support the allegation that Garvin "campaign[ed] against the Union" while at the single location – much less engaged in "constant excoriation." Three of the five employees who were present at the location relayed to the Region that Garvin made no comments that could be objectionable. The other two employees who were present relayed only a single comment Garvin allegedly made regarding Nelson Tree losing the contract and the employees losing their jobs if the Union was voted in – which was made in response to a question soliciting her opinion. To say that the Union embellished the facts of Garvin's alleged comments in the hopes of supporting a position that the true facts would not support is a great understatement.

In sum, as the Regional Director correctly concluded, "[e]ven assuming that Garvin, as an individual non-agent of either party, made the statements about job loss, such conduct by a non-agent is insufficient to create such an atmosphere of fear and reprisal that would preclude the holding of a fair election." (Report at 4)

## II. The Existence of the Conduct Rules are not a Basis to Overturn the Election.

The Regional Director rejected the existence of the conduct rules at issue as a basis for overturning the election results because the issue was untimely raised, not newly discovered, and there was no impact on the election demonstrated. The Union attempts

to avoid this well-founded conclusion by arguing that the work rules must automatically result in a new election because it was the Region, and not it, that raised the issue in connection with the election. However, this again misconstrues the facts and the law.

As the Report reflects, and the email from the Field Investigator confirms, the issue of the impact of the rules on the election was raised by the Union – “On April 15, 2014, . . . the Petitioner asserted for the first time that the Employer’s maintenance of certain work rules warranted setting aside the election.” (Report at 6) In fact, the issue was raised in “the Union’s recently submitted memorandum in support of objections” and it was characterized by the Region as an “unpled objection.” (Exhibit A) Thus, the rules for addressing objections apply.

In responding to the Union’s unpled objection, the Regional Director properly followed the Board’s prior directives that objections to elections must be timely and that only previously unavailable evidence may be otherwise considered.

Section 102.69 of the Rules and Regulations sets forth the procedure that must be followed in the filing and processing of objections to an election. Section 102.69 specifically requires that all objections “to conduct affecting the results of the election” must be filed “within 7 days after the tally of the ballots has been prepared.” A failure to meet this deadline results in the waiver of the objection. *See, e.g., Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984) (parties are not permitted to amend or file further objections after the 7-day period); *Burns Security Services*, 256 NLRB 959 (1981).

The Board in *Burns Security Services* provided a bright line on this issue when it instructed, “entertainment of a whole new set of objections, on the other hand, would vitiate our requirements that parties file timely objections” and therefore, they cannot be

considered. *Burns Security Services*, *id.* at 959. In fact, so limited is the ability to supplement the inquiry into an election that an objecting party can only bring untimely, “newly-discovered evidence” to the Region’s attention “upon presentation of clear and convincing proof that they are not only newly discovered, but also, previously unavailable.” *Burns Security Services*, *id.* at 960; *Rhone-Poulenc, Inc.*, 271 NLRB at 1008. Under these standards, the Regional Director correctly found that the unpled objection is untimely and is not a valid basis to overturn the election.

It is likely the Union’s recognition of the impact of these cases on its unpled objection that has resulted in it really advancing only the argument that it had not actually raised the rules in connection with the election and thus, the Region cannot refuse to vacate the election because of the impact of *American Safety Equipment Corp.*, 234 NLRB 501 (1978) .

However, the Union is mistaken in its contention that, under *American Safety Equipment Corp.*, if it was the Region who raised the issue the Regional Director must vacate the election due to the mere existence of the conduct rules. To the contrary, that holding requires the Regional Director to conclude that the “election has been tainted” by the newly discovered evidence and only then is the Regional Director bound to act. The Regional Director found no such taint here.

The Board’s position on the impact of arguably impermissible work rules on an election can be gleaned from a review of a series of cases that include *Jurys Boston Hotel*, 356 NLRB No. 114 (2011), *Long Drug Stores California, Inc.*, 347 NLRB 500 (2006), *Delta Brands, Inc.*, 344 NLRB No. 10 (2005), and *Safeway, Inc.*, 338 NLRB No.

63 (2002).<sup>2</sup> When these cases are considered, it is clear that a new election is not required.

In *Safeway*, the Board rejected an objection to an election based upon the existence of an impermissible “confidentiality” work rule in the employee handbook. In rejecting the objection, the Board found significant the facts that “there is no evidence that any employee has been disciplined for violating the confidentiality rule, or that the rule was promulgated in response to employees’ union or other protected concerted activities.” *Id.* at 338 NLRB at 525. These same factors are present in this case. The handbook involved was issued years before the appearance of the Union and its organizing efforts. Further, there is no evidence that the attacked rules were raised, discussed, or even seen by any employee in the months leading into the election and there was certainly no employee issued discipline under the rules. Thus, the reasoning of *Safeway* teaches that the mere existence of the rules is not a basis for the direction of a new election.

The law announced in *Delta Brands* also supports the Region’s position. In *Delta Brands*, the Board was again called upon to determine whether the existence of objectionable work rules mandated the overturning of an election and, again, the Board concluded that they did not. The Board in *Delta Brands* found it controlling that the rule at issue there was buried in a 36 page manual, was not brought to the attention of workers, was brief in length, and had not been enforced. *Id.* at 253. The same factors are present here. The handbook at issue is 25 pages in length, the protested rules are brief

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<sup>2</sup> The Board was careful not to overrule or invalidate *Long Drug Stores*, *Safeway*, or *Delta Brands* in its *Jurys Boston Hotel* decision. Rather, the Board expressly left them as viable precedent by concluding “[t]he Board’s decisions in *Safeway* and *Delta Brands*, supra, where election results were upheld despite the employer’s maintenance of objectionable rules, are distinguishable on their facts.” *Jurys Boston Hotel* 356 NLRB No 114 at 2.

and surrounded by other rules, there was no emphasis on the rules, and no employees were disciplined under the rules. Further, the fact that the election results involved an overwhelming rejection of the Union by the employees (15 for and 29 against) demonstrates, according to the Board in *Delta Brands*, that the rule could not have affected the outcome of the vote. *Delta Brands*, 344 NLRB at 253.

As the Board noted in *Delta Brands*, before a work rule can serve as the basis to overturn an election, there must be a showing that it affected the outcome of the election. *Delta Brands*, 344 NLRB at 253 citing *Avante at Boca Raton*, 323 NLRB 555, 560 (1997). No such showing is present here. In fact, the Union's objections of January 17, 2014 are significant on this issue because the omission of any reference to the now-challenged rules demonstrates that the Union did not believe that the rules had any impact on the election results.

The Board also visited the issue of the impact of impermissible work rules on an election in *Long Drug Stores California, Inc.*, 347 NLRB 500 (2006). In that case, the Board found an impermissible confidentiality rule to exist but refused to set aside an election on that basis. In rejecting the objections, the Board reasoned that "[t]he confidentiality provisions were not adopted in response to the Union's organizing campaign. . . . There is no evidence that the Respondent called employees' attention to the confidentiality provisions in either handbook when it was distributed or during the critical period. There is no evidence that these provisions were ever enforced." *Id.* at 502. Significantly, the Board also noted, "[f]urther, the Union lost the election by a wide margin of 68 votes [61% against the union/39% for]. Thus, it is virtually impossible to

conclude that the employee handbook confidentiality provisions could have had an impact on the results of the election.” *Id.* at 503.

All of these factors are also true in the present case. There is no evidence the rules were emphasized or enforced and the margin of victory by the company was even larger – 66% against the union versus 61% -- than the one deemed controlling in *Long Drug Stores*. (Like it did in the *Safeway* and *Delta Brands* decisions, the Board in *Jurys Boston Hotel* did not remove *Long Drug Stores* as viable precedent. Instead, the Board suggested that its holding in *Long Drug Stores* was correct because of the significance of the “one-sided” results. *Jurys Boston Hotel* at 4 n.15. )

Finally, although the Board upheld the election objections in *Jurys Boston Hotel*, a review of the basis for that decision demonstrates that it too does not support the Union’s position. More specifically, the Board in *Jurys Boston Hotel* affirmatively stated that the specific facts of that case directed the outcome -- and none of those facts are present here.

For example, on multiple occasions, the Board in *Jurys Boston Hotel* noted that the election involved in that case was decided by a single vote and that this fact suggested that an effect from the rule was more probable. *Jurys Boston Hotel*, 356 NLRB No. 114 at 2, 3-4 (“we conclude that the result of the election here – decided by a single vote – might well have been affected by the rules at issue . . . .”) and (“Finally, the election here was decided by a single vote in a significantly larger unit (47-46), in contrast to the electoral margin in *Safeway* (6-4).”) and (“the [*Delta Brands*] decision is factually distinguishable here, where . . . there is evidence that one of the rules actually chilled employees and where a single vote decided the election.”) In the present case, the

election was not close and certainly was not decided by a single vote. To the contrary, the employees rejected the Union by 14 votes, which represented an overall rejection by sixty-six percent of the counted votes. Thus, there is no evidence the rules had the required affect necessary to overturn the election results.

Second, the Board in *Jurys Boston Hotel* found it significant that the Union raised its challenge to the rules in an unfair labor practice charge “9 weeks before the election.” *Jurys Boston Hotel* at 3. In the present case, not only was the issue not raised before the election, the propriety of the rules were not even timely raised as an objection to the election after it occurred. This alone eliminates any applicability of the reasoning of *Jurys Boston Hotel*.

In sum, the Regional Director properly rejected the Union’s unpled objection as a basis for overturning the election because it was untimely. However, even if the Region was required to consider the issue, the Regional Director also properly concluded that he was under no obligation to set the election aside under *American Safety Equipment* because the election was not tainted.

### III. Conclusion.

Longstanding precedent is clear – “[r]epresentation elections are not lightly set aside.” *See, e.g., NLRB V. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5<sup>th</sup> Cir. 1991); *Safeway*, 338 NLRB at 525; *Delta Brands*, 344 NLRB at 252-53. Rather, the burden on a party challenging election results is a “heavy one.” *See, e.g., Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6<sup>th</sup> Cir. 1989); *Safeway*, 338 NLRB at 525 *Delta Brands*, 344 NLRB at 253.

Here, this heavy burden has not been met and the desires of the majority of employees in the proposed unit are clear. There is no basis to set aside the expressed desires of the employees.

Respectfully submitted,

A handwritten signature in black ink, reading "Todd D. Penney", written over a horizontal line.

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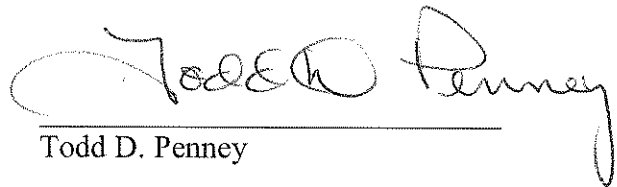
Counsel for Nelson Tree Service, Inc.

## CERTIFICATE OF SERVICE

By signing below I certify that a copy of the forgoing Brief in Opposition to  
Petitioner's Exceptions to Report on Objections and Recommendations to the Board was  
served this 2nd day of July, 2014 by email (Union Counsel) or fax (Region) upon the  
following:

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Todd D. Penney

## EXHIBIT A

## Todd Penney

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**From:** Kurtzleben, Rachel K. [Rachel.Kurtzleben@nrlrb.gov]

**Sent:** Thursday, April 17, 2014 4:17 PM

**To:** Todd Penney

Todd,

Following up on our phone conversation today, you will not be served with the Union's recently submitted memorandum in support of objections. As I understand, the Union is not raising a new objection, but this is an unpled objection for which the Union has now provided its position. What you need to respond to is the Union's claim that the alleged unlawful rules uncovered during the investigation and subject of charge 09-CA-125411, is objectionable conduct sufficient enough to set aside the election. See case: Jurys Boston Hotel, 356 NLRB No. 114 (2011).

Rachel Kurtzleben

7/2/2014